# IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

The John Hancock Life Insurance Company (U.S.A.),

Plaintiff.

v.

BARRY MAYERSON, individually and in his capacity as Trustee of The M. Diamond Irrevocable Life Insurance Trust, and AVIGDOR GUTWEIN,

Defendants.

Civil Action No.:

U.S. DISTRICT COURT E.D.N.Y

JUL 27 2009

BROOKLYN OFFICE

09 3222 GO, M.J. TRAGER, J.

### **COMPLAINT**

Plaintiff The John Hancock Life Insurance Company (U.S.A.) ("John Hancock" or "Plaintiff"), for its Complaint against Barry Mayerson, individually and in his capacity as Trustee of The M. Diamond Irrevocable Life Insurance Trust (the "Trust"), states as follows:

### **NATURE OF ACTION**

- 1. This is an action for declaratory judgment, fraud and civil conspiracy to determine John Hancock's rights and obligations regarding a life insurance policy with a death benefit of \$8 million that John Hancock issued to the Trust insuring the life of Melvin Diamond (the "Policy").
- 2. Beginning in 2007, the Defendants conspired in a scheme to defraud John Hancock into issuing the Policy, which Defendants knew was not being procured to meet legitimate insurance or estate planning needs but was instead being procured as a speculative investment for the benefit of a third-party investor lacking insurable interest in the life of the insured, Melvin Diamond. Such an investment is an illegal wager contract that is prohibited as a matter of law and under the terms of the Policy.

- 3. Defendants accomplished their scheme through the use of an arrangement designed to disguise the lack of insurable interest by interposing numerous sham trusts which purported to have insurable interest in the life of the insured and by misrepresenting to John Hancock material information about the purpose of the Policy, the trusts and the income and net worth of the insured.
- 4. John Hancock seeks a declaratory judgment that the Policy is either void or voidable because it was procured through material misrepresentations and as a speculative investment for the ultimate benefit of a disinterested third party who lacks insurable interest in the life of the purported insured. John Hancock also seeks damages it has suffered as a result of the Defendants' fraud.

#### **PARTIES**

- 5. John Hancock is a Michigan corporation with its principal place of business in Massachusetts. It is a financial services company whose business activities include providing life insurance to consumers.
- 6. The M. Diamond Irrevocable Life Insurance Trust, a trust purportedly established on June 12, 2007, and governed in accordance with the laws of the State of New York, is the purported owner of life insurance policy number 93 680 148 delivered by John Hancock on or about November 19, 2007, and purporting to insure the life of Melvin Diamond for \$8 million.
- 7. Upon information and belief, Barry Mayerson maintains a primary residence and/or principal place of business at 1961 60<sup>th</sup> Street, Brooklyn, New York 11204, and is a citizen of the State of New York within the meaning of 28 U.S.C. § 1332.
- 8. Upon information and belief, Avigdor Gutwein is an independent life insurance broker. Gutwein maintains a primary residence and/or principal place of business at 390 Berry

Street, 4th Floor, Brooklyn, NY 11211 and is a citizen of the State of New York within the meaning of 28 U.S.C. § 1332.

### **JURISDICTION**

- 9. This case seeks, *inter alia*, a declaratory judgment pursuant to 28 U.S.C. § 2201 to adjudicate the rights and legal relations of the parties hereto.
- 10. This Court has jurisdiction over this diversity action pursuant to 28 U.S.C. § 1332. The amount in controversy exceeds \$75,000, exclusive of interest and costs, and is between citizens of diverse states.
  - 11. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(a).

### **FACTUAL ALLEGATIONS**

- 12. John Hancock is, and during all relevant times has been, engaged in the business of selling life insurance to consumers.
- 13. Avigdor Gutwein is an independent life insurance broker. Gutwein solicits sales of life insurance policies to consumers from life insurance companies such as John Hancock.
- 14. On or about September 19, 2007, Gutwein and Defendant prepared an application seeking the issuance of a policy of life insurance on the life of Melvin Diamond (the "Life Insurance Application"). The Life Insurance Application sought \$5 million of coverage and designated the Trust as the intended owner of the policy. A true and correct copy of the Life Insurance Application is attached hereto, and incorporated herein by reference, as Exhibit 1.
- 15. The Life Insurance Application bears the signature of Gutwein as the agent procuring the policy, the signature of the Defendant as the proposed owner of the policy, and the purported signature of Melvin Diamond as the proposed insured.

- 16. As part of the Life Insurance Application, Gutwein and Defendant represented to John Hancock that Melvin Diamond's annual income was \$775,000.00 and his household net worth was more than \$17,000,000.00 and that the purpose of the life insurance policy was estate planning.
- Application that no one other than the owner of the policy (*i.e.*, the Trust) would have "any right, title or other legal or beneficial interest in any policy issued on the life of" Melvin Diamond by John Hancock and that the cost of the policy (*i.e.*, the premiums) would be financed by Melvin Diamond's savings and investment income.
- 18. These representations were made for the purpose of inducing John Hancock to issue a life insurance policy with a face value of \$8,000,000 on the life of Melvin Diamond.
- 19. Specifically, the Life Insurance Application includes the following answers to questions relating to the ownership and funding of the policy:
  - "5. Is there, or will there be, an understanding or agreement providing for a party, other than the Owner designated in question 3. a), to obtain any right, title or other legal or beneficial interest in any policy issued on the life of the Proposed Life Insured(s) as a result of this application?" In answer, the "No" box is checked.

    "6. a) What is the source of funding of the policy(ies) currently applied for? [left blank]"
  - "6. b) Will the Owner, now or in the future, be paying premiums funded by an individual and/or an entity other than the Proposed Life Insured(s), or the Proposed Life Insured's employer?" In answer, the "No" box is checked.

- "7. Will the premiums be financed through a loan?" In answer, the "No" box is checked. "If No, describe the funding arrangement. Savings and investment income".
- 20. The Life Insurance Application also includes the following answers to questions relating to the purpose of the policy and Melvin Diamond's financial position:
  - "13. a) What is the purpose of this insurance? (e.g. estate conservation, buy-sell, keyperson) Estate Planning"
  - "13. d) Gross annual unearned income (dividends, interest, net real estate income, etc.) Approx. \$775k"
  - "13. e) Household net worth (combined) Family valued at \$17+ Million"
- 21. An Application Supplement dated November 19, 2007, purportedly signed by Melvin Diamond as proposed life insured and Defendant as Trustee, states:

"The face amount excluding riders is \$8,000,000.00"

"The answer to question 6A of the application should read: Savings and Investment Income"

"The Answer to Question 4C of the health questionnaire should read: consulted Dr. Epstein on September 2006"

22. The Life Insurance Applications provide that the owner (*i.e.*, the Trust) and the proposed insured (*i.e.*, Melvin Diamond) acknowledge and agree that the statements and answers given in the application are "complete and true to the best of my/our knowledge."

- 23. On September 9, 2007, Gutwein completed and signed an agent report in connection with the application for the Policy. A true and correct copy of the agent report is attached hereto, and incorporated herein by reference, as Exhibit 2.
  - 24. Gutwein provided the following answers to questions in the agent report:

    "4. a) Is there, or will there be an understanding or agreement providing for a

    party, other than the Owner designated in the Application, to obtain any right, title

    or other legal or beneficial interest in any policy issued on the life of the of the

    Proposed Life Insured(s) as a result of this application?" In answer, the "No" box

    is checked.
    - "4. c) Will the premiums, now or in the future, be funded by a loan or other means from someone other than the Insured or the Insured's employer?" In answer, the "No" box is checked.
- 25. In the agent report, Gutwein represented, acknowledged and agreed to the following statement: "I declare that I have asked the Proposed Life Insured(s) and/or the Owner each question on the application. The answers have been recorded by me exactly as stated and I know of nothing affecting the insurability of the Proposed Life Insured(s) which is not fully recorded in this application."
- 26. In connection with the Life Insurance Application, Diamond, Gutwein, and Mayerson executed a trust certification form dated September 19, 2007. A true and correct copy of the trust certification is attached hereto, and incorporated herein by reference, as Exhibit 3.
- 27. The trust certification required the Grantor (Melvin Diamond), the Trustee (Barry Mayerson) and the Agent (Gutwein) to certify, among other things, that:

Beneficial interests under the Trust can and will only be established for persons who (i) are related to the Proposed Life Insured by blood or law, (ii) have a

substantial interest in the Proposed Life Insured engendered by love and affection, or (iii) hold a lawful and substantial economic interest in the continued life of the Proposed Life Insured.

- 28. In reliance on the statements and representations made in the Life Insurance Application, the agent report, and the trust certification, John Hancock issued the Policy on November 12, 2007, and delivered the Policy on November 19, 2007. The Policy provides a face amount death benefit of \$8 million and designates the Trust as the policy owner and beneficiary.
- 29. In connection with the issuance of the Policy, John Hancock has incurred certain costs and expenses, including, commissions and bonuses to paid Gutwein and others on the Policy.
- 30. Following the issuance of the Policy, John Hancock discovered that the representations and statements made by Mayerson, Diamond, and Gutwein in the Life Insurance Application and other documents were materially false and misleading.
- 31. Specifically, by way of illustration only, after John Hancock issued the Policy it discovered that:
  - Mayerson, Diamond and Gutwein falsely certified that the beneficial interests in the Trust would only be established for persons with insurable interest in the life of the insured.
  - The Life Insurance Application and other documents materially misstated the purpose of the Policy.
  - The Life Insurance Application and other documents materially misstated the source of the premium payments and the annual income and net worth of the insured, Melvin Diamond.

 Eli Knoll, the CPA who purportedly served as part of the application process as a thirdparty verifier of Melvin Diamond's financial information, has never met Melvin Diamond and did not provide the verifying information regarding Melvin Diamond's finances.

## FIRST CLAIM FOR RELIEF Declaratory Judgment Regarding Material Misrepresentations

- 32. John Hancock realleges the allegations contained in paragraphs 1 to 32, *supra* as though fully set forth herein.
- 33. There exists an actual controversy between John Hancock and Defendant that lies within the jurisdiction of this Court pursuant to 28 U.S.C. § 2201.
- 34. Gutwein, Mayerson, Diamond and others made false, misleading and material misrepresentations in the Application and Agent Report submitted to John Hancock in applying for the Policy. These misrepresentations were made with the understanding and intention that John Hancock would rely on them. The misrepresentations included, specifically, that Melvin Diamond had a net worth of more than \$17 million and an annual income of \$775,000 and that the purpose of the insurance was for estate planning.
- 35. In issuing the Policy, John Hancock relied on the foregoing representations made in the Application, agent report, trust certification and other documents completed and submitted to John Hancock by or on behalf of Mayerson, Gutwein, the Trust and/or Melvin Diamond. John Hancock would not have issued coverage had accurate representations been made in place of these inaccurate representations.
- 36. John Hancock is entitled to rescind the Policy because the misrepresentations in the Application were material to the acceptance of the risk on the Policy, and because John Hancock would not have issued the Policy had it been aware of the true facts.

37. Accordingly, John Hancock is entitled to a declaration that it may rescind the Policy based on the foregoing material misrepresentations and that such rescission will be effective upon entry of this Court's judgment; and that John Hancock will have no obligation to pay benefits under the Policy because, upon entry of this Court's judgment, it will be rescinded.

# SECOND CLAIM FOR RELIEF Declaratory Judgment Regarding Insurable Interest

- 38. John Hancock realleges the allegations contained in paragraphs 1 to 32, *supra* as though fully set forth herein.
- 39. Life insurance policies lacking insurable interest are unenforceable aleatory contracts.
- disinterested third party which lacks insurable interest in the life of the insured. This was accomplished through the use of an arrangement designed to disguise the lack of insurable interest by interposing a sham trust which purports to have insurable interest in the life of the insured. The use of the trust form is in furtherance of a scheme to evade the public policy against "gaming" through life insurance purchases.
- 41. Accordingly, John Hancock is entitled to a declaratory judgment that the Policy lacked an insurable interest at the time it was issued and thus is void; or alternatively and additionally that the Policy is voidable and Plaintiff is entitled to rescind the Policy, with such rescission effective upon entry of this Court's judgment; and in all events that John Hancock thus has or will have no obligation to pay benefits under the Policy.

### THIRD CLAIM FOR RELIEF Fraud

### (Against Defendants Mayerson and Gutwein)

- 42. John Hancock realleges the allegations contained in paragraphs 1 to 32, *supra* as though fully set forth herein.
- 43. The Life Insurance Applications, trust certifications, agent reports and other documents contained numerous false representations, each of which was material to John Hancock's decision to issue the Policy.
- 44. These material misrepresentations were part of a scheme to defraud John Hancock that, on information and belief, was conceived and orchestrated by Defendants and others.

  Specifically, Defendants and others knowingly and intentionally defrauded John Hancock into issuing a life insurance Policy with a death benefit of \$8 million by misrepresenting the purpose of the Policy, the source of the premium payments and the annual income and net worth of the insured.
- 45. On information and belief, at all relevant times, including when the Life Insurance Application was executed and submitted to John Hancock, the initial premium payment was submitted, and the Policy was delivered, Defendants were aware of the falsity of those representations.
- 46. As a result of the fraudulent scheme, John Hancock issued the Policy, and has suffered injury, in an amount to be proven at trial, arising from, without limitation:
  - a. The commissions and bonuses paid on the Policy;
  - b. The costs of administering the Policy;
  - c. The costs of investigating the issuance of the Policy; and
  - d. The risk of being required to pay a benefit on the fraudulently procured Policy.

- 47. Accordingly, John Hancock is entitled to judgment that Defendants defrauded it in obtaining issuance of the Policy, and are liable for John Hancock's injuries.
- 48. John Hancock is further entitled to recover actual and punitive damages in light of the conduct of Defendants, committed with malice and deliberate fraud.

# FOURTH CLAIM FOR RELIEF Civil Conspiracy (Against Defendants Mayerson and Gutwein)

- 49. John Hancock realleges the allegations contained in paragraphs 1 to 32, *supra* as though fully set forth herein.
- themselves, and with other persons known and unknown, the purposes of which were, *inter alia:*(i) to fraudulently misrepresent the purpose of the Policy, the source of the premium payments and the annual income and net worth of the insured; (ii) to conceal that the Policy was being obtained by a sham trust as a speculative investment for the ultimate benefit of a third-party investor lacking insurable interest in the life of the insured; and (iii) to defraud John Hancock into issuing a life insurance Policy with a death benefit of \$8 million.
- 51. During the course of the conspiracy, the conspirators, acting in concert, engaged in numerous concerted acts to further the purposes of the conspiracy, including but not limited to those described above. Each act of the conspiracy was ratified by the other co-conspirators, who acted as each other's agents in carrying out the conspiracy. The Defendants engaged in the conspiracy to benefit themselves and profit from the scheme at the expense of John Hancock.
- 52. As a direct and proximate result of the conduct of Defendants, John Hancock issued the Policy, and has suffered injury, in an amount to be proven at trial, arising from, without limitation:
  - a. The commissions and bonuses paid on the Policy;

- b. The costs of administering the Policy;
- c. The costs of investigating the issuance of the Policy; and
- d. The risk of being required to pay a benefit on the fraudulently procured Policy.
- 53. Each defendant is jointly and severally liable for the torts of the other members of the conspiracy that were committed in furtherance of the goals of the conspiracy.
- 54. Accordingly, John Hancock is entitled to judgment that Defendants are each jointly and severally liable for John Hancock's injuries arising as a result of the torts committed in furtherance of the goals of the conspiracy.

### WHEREFORE John Hancock seeks judgment:

- a. Declaring that John Hancock is entitled to rescind the Policy and that such rescissions will be effective upon entry of this Court's judgment, at which point John Hancock will have no obligation to pay benefits or otherwise render any performance under the Policy.
- b. Declaring that the Trust and its successors in interest do not have any valid right or interest or claim to any benefit under or from the Policy.
- c. In the alternative, declaring that the Trusts and its successors in interest will not have any valid right or interest or claim to any benefit under or from the Policy upon rescission of the Policy by entry of this Court's judgment.
- d. In the alternative, declaring that the Policy is void for lack of insurable interest and that John Hancock has no obligation to pay benefits or otherwise render any performance under either of the Policy.

- e. Declaring that John Hancock has no obligation to return the premiums because the Defendants engaged in a scheme to defraud John Hancock and thus have unclean hands, and the Defendants are not entitled to a return of premiums.
- f. Alternatively declaring that, even if the Court determines that John Hancock is required to tender return of premiums in connection with the rescission counts, it is also entitled to offset the amount of its costs and expenses, notably the commissions John Hancock paid on the Policy, which exceed the amount of premiums received.
- g. Awarding all damages incurred as a result of the fraud perpetrated on John Hancock, including, but not limited to, commissions and compensations paid in connection with the Policy, as well as other compensatory and consequential damages.
- h. Awarding all damages incurred as a result of the conspiracy of Defendants, including, but not limited to, commissions and compensations paid in connection with the Policy, as well as other compensatory and consequential damages.
- i. Awarding punitive damages.
- j. Awarding attorney fees and costs associated with bringing this action.

k. Awarding such other relief as the Court deems just, equitable, and proper.

Dated: July 27, 2009 Armonk, NY

Respectfully submitted,

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Attorney for Plaintiff The John Hancock Life Insurance Company (U.S.A.)

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and the second section of the second	RATIONS the statements and answers in this application and any form that is made part
of this application are complete and true to the best of thyroth knowledge and had addition, lives understand and agree that:	
<ol> <li>The statements and answers in this application, which include the Policy Details and any supplemental form relating to the health, aviation or lifestyle of the Proposed Life Insured(s), will become part of the Insurance policy issued as a result of this application.</li> <li>(a) Any life insurance policy issued as a result of this application will be effective on the later of the date the first premium has been paid in full and the date the policy has been delivered. The insurance will not be in effect if there has been a detarioration in the insurability of any proposed life insured(s) since the date of the application.  If the Temporary Insurance Agreement (TIA) coverage is in effect and a subsequent policy is issued within 90 days of the date of the little textited that here agranged only applies to any</li> </ol>	<ol> <li>(b) If premiums are paid prior to delivery of the policy and the terms and conditions of the Temporary insurance Agreement are satisfied, insurance prior to the effective date shall be provided only under the Agreement and according to its terms.</li> <li>ANY PERSON WHO INCLUDES ANY FALSE OR MISLEADING INFORMATION ON AN APPLICATION FOR AN INSURANCE POLICY IS SUBJECT TO CRIMINAL AND CIVIL PENALTIES.</li> </ol>
amount in excess of the TPA emount.	OBTAIN INFORMATION
We, the Proposed Life Insured(s), authoriza;  1. John Hancock Life Insurence Company (U.S.A.), John Hancock Variables  (The Company) to obtain an investigative consumer report on melius.  2. Any medical professional, medical care provider, hospital, clinic, laborato similar person or organization to give The Company and its reinsurers into The information collected by The Company may relate to the symptoms, extin turn. The Company is free to disclose such information and any information (a) its reinsurers; (b) the MiB Inc.; (c) other insurance companies as design or (f) any person or entity entitled to receive such information by law or as it takes extraordation greater of the Notice of Disclosure of Information relating	Life Insurance Company or John Hancock Life insurance Company  Ty, insurance company, the Medical Information Bureau (MIB Inc.), or any other formation about medus or any minor child/children who islare to be insured.  amination, diagnosis, treatment or prognosis of any physical or mental condition.  on developed during its evaluation of my/our application to:  alad by me/us; (d) me/us; (e) any medical professional designated by me/us;  we may further consent.  to the underwriting process, investigative consumer reports and the MIB Inc.  copy of this authorization will be as valid as the original.  to evaluate my/our application for insurance, to evaluate a claim for benefits.
I am/We are entitled, or my/our authorized representative to entitled, to a co	TANDAL MILET DE COMPI FORD
Under the penalties of parkery, I the Owner, certify that:  1. The number shown on Page 1 of the application is my correct tax  "Applied for" in the box on Page 1), AND	
2. Check the applicable box:  (R) am not subject to Backup Tax Withholding because (a) I am at (b) I have not been notified by the internal Revenue Service (IR report all interest or dividends, or (c) the IRS has notified me that I am at I Tay between Backup a Service (IRS) has notified me that I am at	at the major emission in Backton Tax withholding, Anu
2. I am a U.S. resident (including a U.S. resident allen).  The internal Revenue Service does not require your consent to any Backup Tax Withholding.	provision of this document other than the certifications required to avoid
Signatures - Please read all of the above Declarations and Authorizal	ions before signing this form.
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rent Questions - To be completed by the	e Agent/Registered Representative  b) Has a Temporary Life Insurance Agreement been issued?	Yes A No
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12No Li Yes - give details	Proposed Life insured(s) as a result of this application, replace a policy that has been sold, a	ssigned or settled
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John Hancock.	Trust Gertification  John Hancock Life Insurance Company (U.S.A.)  John Hancock Variable Life Insurance Company  John Hancock Life Insurance Company  (hareinster retered to as The Company)
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